(2)

No. 03-89

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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KIM SHEFFIELD, *et al.*,
Petitioners,

v.

LARRY ACEVES, in His Capacity as Superintendent, Franklin McKinley Elementary School District, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNION RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals properly held that a public employer incurs no liability under 42 U.S.C. § 1983 for failing to police the details of the union's annual agency fee notice issued pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), unless the employer takes adverse action against the feepayers beyond making routine payroll deductions for agency fees.

II. Whether the Court of Appeals properly held that small local unions with low annual revenues and relatively simple finances can fulfill *Hudson*'s requirement of providing their nonmembers with "sufficient information to gauge the propriety of the union's fee," enabling them to make the relatively simple decision whether to challenge the union's calculation of the fee, by providing them with a statement of the union's chargeable and non-chargeable expenditures and affording them access to the union's financial books, records and associated documents, rather than through a formal and costly independent audit.

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STATEMENT

We do not take issue with the facts stated in the Petition's Statement of the Case (Pet. at 3-6), although we do disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

Respondents join in, adopt, and incorporate herein by reference the arguments presented in the Brief in Opposition to *Certiorari* filed by the Respondent Superintendents as to why certiorari should not be granted on Question Presented I.

This brief addresses the reasons why certiorari should be denied on Question Presented II: there is no conflict between the Court of Appeals' decision and Supreme Court precedent; the issue was correctly decided by the Court of Appeals; the conflict among the circuit courts and state courts is relatively recent and very shallow; and the question is not of substantial importance, so that the issue should be addressed by other courts before it merits this Court's attention.

First, the Court of Appeals' decision was not contrary to this Court's precedent. This Court requires unions to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," in order to decide whether to challenge the union's calculation of the amount of the fee. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986). In *Hudson*, this Court considered the sufficiency of the information provided by a large local union representing a bargaining unit of 27,500 employees, with an annual budget of $4.1 million, and did not decide whether very small local unions may provide nonmembers with sufficient financial information to allow independent verification of the union's breakdown of expenses by methods other than a formal audit. *See* Section II.

Second, the Court of Appeals' determination that small local unions can fulfill *Hudson*'s notice requirements by providing nonmembers with financial information that can be independently verified, rather than through a formal audit, was correct. The finances of many small local unions such as the one involved in the present case—which had just 231 members and annual revenues of less than $30,000—are sufficiently simple that a layperson could easily examine and understand the union's financial records in order to determine whether to challenge the fee's calculation. Further, a requirement that small local unions conduct formal audits would cost such unions far more money than they receive from nonmember agency feepayers and, as such, would

conflict with this Court's prohibition on unnecessarily restricting a union's ability "to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)). *See* Section III.

Third, the division among the courts does not yet warrant this Court's intervention. The Court of Appeals' decision is in conflict with just one decision by another court of appeals and one decision by a state supreme court. Only one other state court has directly addressed the issue, reaching the same conclusion as the Court of Appeals. The first of the relevant decisions was issued in 1999. Thus, the split has emerged very recently and is extremely shallow, and the issue would benefit from further development in the lower courts before it merits this Court's attention. *See* Section IV.

Fourth, the question whether small local unions must provide nonmembers with financial information that is verified by a formal audit as part of their *Hudson* notices is not an important legal issue. It arises in a limited number of states (those that allow *both* collective bargaining by public employees *and* agency fees), concerns only small local unions, and involves a very small amount of money. *See* Section V.

I. LEGAL AND FACTUAL BACKGROUND

This Court has held that individuals who are part of a bargaining unit that is represented by a union, but who elect not to become members of that union, may be required to pay that union a fee (typically called an "agency fee" or "fair share fee") which helps to defray the union's costs of representational services that benefit union members and nonmembers alike. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26, 232 (1977). These services include, but are not limited to, "negotiating and administering a collective-bargaining agreement and representing the interests

of employees in settling disputes and processing grievances." *Id.* at 221. Requiring payment of an agency fee serves "to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 221-22. However, nonmembers may not be required to contribute to a union's political or ideological expenditures over their objection. *Id.* at 235-36. Thus, the Court has sought to accomplish "the objective" of "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237.

In order to do so, the Court has allowed unions to require nonmembers to contribute only their proportionate share of revenues that are spent on "chargeable" (i.e., non-political or ideological) activities. To protect nonmembers' right not to be forced to contribute to the union's "non-chargeable" expenses, a union must give nonmembers "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. The union's explanation of the basis for the fee must set forth "sufficient information to gauge the propriety of the union's fee," so that nonmembers can decide whether to file an objection challenging the proportionate share amount. *Id.* at 306. Filing such a challenge is cost-free, and triggers the requirement that the union submit the dispute over the fee amount to the impartial decisionmaker mentioned above.[1] *Id.* at 307.

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[1] By filing a challenge, the feepayer automatically becomes a party to the annual *Hudson* arbitration of agency fee challenges that regularly

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

In *Hudson*, the Court held invalid the notice provided by the Chicago Teachers Union ("CTU"), which had disclosed only its "non-chargeable" expenditures to nonmembers and provided no information about the expenditures that it deemed chargeable, "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee" that the union had assessed. 475 U.S. at 306. The CTU had determined that the chargeable expenditures amounted to 95% of union dues, but provided information only about the 5% of its budget that was allegedly made up of non-chargeable expenses; thus, feepayers had no information at all about 95% of the union's expenditures. *Id.* at 295, 306-07. Accordingly, the Court held that "[a]n acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* at 307. In a footnote, the Court emphasized that "absolute precision" in the calculation and explanation of the fee is not required, and that the CTU "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but commented that "adequate disclosure

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occurs on an annual basis. The feepayer need not personally participate in, or even attend, the arbitration in order to obtain the benefit of any reduction in the fee ordered by the arbitrator. The arbitrator's decision is binding on the union, but does not preclude the feepayer from challenging the fee on a *de novo* basis in court. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.5 (1998); *Hudson*, 475 U.S. at 308 n.21; *Bromley v. Michigan Education Ass'n*, 82 F.3d 686, 692-95 (6th Cir. 1996). Thus, filing a challenge to the fee neither costs the feepayer anything nor has any adverse effect upon the available litigation options. "[M]ounting a challenge is for all practical intents and purposes free." *Gilpin v. American Fed. of State, County & Municipal Employees*, 875 F.2d 1310, 1316 (7th Cir. 1989).

surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18 (brackets deleted). The language in this footnote, which (as we show below) relates *only* to the mammoth CTU, is the basis for petitioners' contention that the Court of Appeals' decision is contrary to this Court's precedent.

Respondent Dinuba Teachers Association ("DTA"), like other small affiliates of the California Teachers Association ("CTA"), annually provides nonmember feepayers with a "*Hudson* notice" that contains a full breakdown of its actual chargeable and nonchargeable expenditures for the relevant prior fiscal year, together with its calculation of the overall percentage of its expenditures that is chargeable to objecting feepayers. The union's statement is supported by financial reporting forms required by California's Public Employment Relations Board, which, *inter alia*, set out the union's major categories of expenditures that are chargeable and non-chargeable to agency feepayers. Thus, in contrast to the union in *Hudson*, DTA provides feepayers with full disclosure of all the major categories of 100% of its expenses, including both chargeable and non-chargeable expenditures. And although not audited, these statements of the union's chargeable and non-chargeable expenditures are sworn to by a union officer under penalty of perjury. In addition, each feepayer is informed that he or she may, upon request, inspect the union's detailed financial records, *i.e.*, its checkbook and cancelled checks.[2]

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[2] DTA's feepayers also receive fully audited financial statements (unchallenged by petitioners) showing the chargeable and nonchargeable expenditures of its parent affiliates, CTA and the National Education Association ("NEA"), on which the agency fees charged by those affiliates are based. These CTA and NEA fees constitute by far the major portion of the agency fee that DTA nonmembers are required to pay. Thus, feepayers *do* receive audited financial disclosure with regard to the

The Court of Appeals held DTA's notice constitutionally deficient, because the financial information it provided feepayers was "only part of the information required to verify the financial statements." *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1048-49 (9th Cir. 2003). In doing so, however, it rejected petitioners' contention that small unions such as DTA can only meet *Hudson*'s requirements through a formal audit. *Id.* at 1046. Instead, it held that a union "must provide a statement of its chargeable and nonchargeable expenses, together with independent verification that the expenses were actually incurred," and that smaller unions could fulfill this requirement by "devis[ing] flexible and creative 'auditor verifiable methodolog[ies],' appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification, without depleting the union coffers." *Id.* at 1046, 1049 (citations omitted; second brackets in original). Specifically, the court noted that, "[f]or the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review." *Id.* at 1049. But rather than "dictat[ing] the particular procedure" such unions should follow, the Court of Appeal required that it be "sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did." *Id.*

The Court of Appeals' holding was fully consistent with Supreme Court precedent. In *Hudson*, this Court did not announce a rule that every union, regardless of size, budget, or complexity of finances, must provide a formally audited financial statement as part of its notice to nonmembers. Rather, *Hudson* held that nonmembers must be given "adequate disclosure of the reasons why they were required to

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lion's share of the fair share fee, and a statement of expenditures along with the right to examine financial records with regard to the rest.

pay" the fee calculated by the union. 475 U.S. at 307. That is, they must not be left "in the dark about the source of the figure for the agency fee," but should be given "sufficient information to gauge the propriety" of the fee. *Id.* at 306. In the context of a case involving large union with complicated finances—like the union involved in *Hudson*—this necessitated a formally audited financial statement. *Id.* at 307 n.18.

CTU, the union in *Hudson*, had 27,000 members and annual revenues exceeding $4.1 million. *See id.* at 294, 298 n.4. This union doubtless would have obtained an annual audit of its expenditures as a matter of course, but nonetheless had left members in the dark about all but 5% of its expenses. More importantly, given the complexity of the finances of a multi-million dollar organization like CTU, there is no other way that the union could have provided nonmembers with the opportunity to independently verify the union's account of its expenditures. A nonmember would be overwhelmed if provided with the raw data concerning the $4.1 million in expenditures on which CTU's fee was based. Therefore, the Court determined that an audit was required in the circumstances of that case. In fact, the Court made it clear that in its footnote concerning the "audit" requirement it was addressing CTU specifically (rather than unions generally) by referring to "the Union" (with a capital "U") rather than "the union" generically. Earlier in its decision, the Court had made clear that it used the term "the Union" (with a capital "U") to refer specifically to the CTU. *See, e.g., Hudson*, 475 U.S. at 294-95.

The question presented to the Court of Appeals in the instant case, in contrast, was whether the Court's footnote requiring a large union organization to obtain a formal audit necessarily applies in full measure to a union like respondent DTA—a small local affiliate of the CTA—which, in the relevant fiscal year, had some 231 members, no professional

staff, a budget of less than $30,000, and seven agency fee-payers from whom it collected a total of $613.17 in agency fees. SER 109, 168-70, 173. The Court's footnote with respect to unions the size of CTU cannot be applied, and surely was never intended to be applied, without analysis, to an entity like DTA that is less than 1/100th the size of CTU measured by membership or revenue, for which the costs of an audit would far exceed the amount of revenue that it collects from nonmembers. This is especially true given that, unlike the CTU, which left its feepayers "in the dark" by disclosing *no* financial information regarding 95% of its expenditures, the DTA disclosed financial information regarding 100% of its expenditures.

Permitting a small local union to provide its disclosure by methods other than a formal audit is fully consistent with both the letter and spirit of *Hudson*'s holding, as long as nonmembers are provided with adequate information to allow them to verify the description of the union's actual expenses.[3]

III. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE

The Court of Appeals reached the right conclusion in light of the relevant precedent and the purpose of the financial disclosure requirement. A contrary ruling—that all local unions must obtain and distribute formal audits, regardless of their size—would have served no discernable purpose and

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[3] In fact, the requirements that the Court of Appeals' decision imposes on small unions that do not obtain formal audits go far beyond the disclosure of the "major categories of expenses" required by *Hudson*. By allowing feepayers to inspect their checkbooks, canceled checks, bills and other materials, unions would afford feepayers something the *Hudson* Court expressly *declined* to require: the opportunity to inspect the original records of *all the union's expenditures*. *See* 475 U.S. at 307 n.18 ("The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures . . . ."); *compare Harik*, 326 F.3d at 1049.

would contravene this Court's clear directive that unions must be able to require nonmembers to contribute to the costs of collective bargaining.

It is evident why formally audited financial statements may be the only feasible way of providing feepayers with the requisite financial disclosure in the case of a multi-million dollar organization like CTU, which has complicated finances that would not be easily understood simply by providing a nonmember with the underlying source documents that show the union's expenses. However, it is eminently feasible for a smaller union such as DTA, whose financial transactions are neither extensive nor complicated, to provide feepayers with adequate information in other, more cost-effective ways to permit them to make informed decisions about whether to challenge the fee. The financial affairs of a small local union such as DTA "will be no more complex than a teacher's family finances." SER 75 (Declaration of Martin Benis, Certified Public Accountant). DTA's expenditures are sufficiently few in number that interested nonmembers can be given the union's financial books and records and associated documents to see for themselves the purposes for which the union's money was spent.

The purpose of the financial disclosure that *Hudson* requires, it must be remembered, is not to prove that the union's calculation of chargeable versus non-chargeable expenditures is correct. Rather, the purpose is simply to enable feepayers to make informed decisions about whether to accept the union's calculation of its agency fee or to exercise their right to challenge the fee so that the union will be required to meet its burden of proof before an independent decisionmaker. *See, e.g., Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991) ("The test of adequacy of the initial explanation to be provided by the union is not whether the information supplied is sufficient to enable the employee to determine in any final sense whether the union's

proposed fee is a correct one, but only whether the information is sufficient to enable the employee to decide whether to object. If the employee objects, *then* the union will be called upon to demonstrate more completely its justi-fication for the fee"). Once such a challenge is made, it is the union's burden to establish, to the satisfaction of an independent decisionmaker, its entitlement to the fee that it seeks. *See Hudson*, 475 U.S. at 307-08. In deciding whether to challenge the fee, the feepayer is contemplating an act that—in contrast to many other endeavors undertaken in reliance on audited or non-audited financial statements—not only involves a simple decision, but is virtually cost-free and risk-free: if in doubt, the feepayer need only submit a challenge, which costs nothing but the price of a first-class stamp. *See* note 1, *supra.*

In light of the limited purpose of this financial disclosure, nonmembers will be able to review quite easily the relatively simple finances of a small local union in order to determine whether to file a challenge.[4] The mere absence of a formal audit does not mean that nonmembers will be left "in the dark about the source of the figure for the agency fee" and "requir[ed] . . . to object in order to receive information." *Hudson*, 475 U.S. at 306. To the contrary, they will receive *greater* disclosure than feepayers of larger unions. *See* note 3, *supra.* Under these circumstances, a small local union such as DTA need not obtain a formal audit in order to fulfill

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[4] For this reason, petitioners' contention that nonmembers will be required to spend 33 hours reviewing the union's finances is off the mark. Pet. at 21. The purpose of nonmembers' review will not be to prepare a formal audit, but to make the simple decision whether to submit a challenge. Nonmembers are not being "press[ed] . . . into serving as [unions'] auditors." Pet. at 20. Nor would a nonmember need to identify which expenses he or she is challenging in order to file a challenge. *See Air Line Pilots Ass'n*, 523 U.S. at 878. For that reason, petitioners' citation to *Abood*'s admonition that nonmembers not be required to monitor the union's expenses is simply inapposite. Pet. at 20 (citing *Abood*, 431 U.S. at 241).

Hudson's requirement that feepayers be informed of the union's "major categories of expenses," so that they have "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306, 307 n.18.

Besides being unnecessary, a requirement that small local unions such as DTA obtain formal audits in order to collect fees from nonmembers would eviscerate the right of these unions to require nonmembers to contribute to the costs of collective bargaining. *See Hudson*, 475 U.S. at 302; *Abood*, 431 U.S. at 221-22, 237. The cost of a formal audit of DTA's expenditures would dwarf the amount DTA stands to collect in agency fees—DTA would have had to spend on the order of $2,800 in independent auditors' fees in order to collect $613.17 in agency fees. *See* SER 109, 134-36.

Small local unions must be able to pursue grievances and arbitrations, engage in collective bargaining, retain counsel as necessary, and otherwise represent the members of the bargaining unit (union members and agency feepayers alike). Such efforts, this Court has recognized, "entail expenditure of much time and money." *Abood*, 431 U.S. at 221. Having to incur such disproportionate transaction costs to collect an agency fee would significantly undermine the ability of a small local union with a limited budget to fulfill these collective bargaining responsibilities, and would thereby threaten the union's ability to conduct the representational activity that constitutes its reason for being.[5]

Requiring small local unions to obtain audits that cost far more than the amount that they receive from feepayers will

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[5] For similar reasons, the federal government exempts from federal audit requirements entities that spend less than $300,000 per year in federal awards, requiring simply that such entities make records available for review or audit by federal officials. *See* Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35278, 35291 (June 30, 1997).

lead most small unions to forego collection of any agency fee from the nonmembers they represent. This would conflict with this Court's directive that "'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237).

Compounding the problem, if small unions are required by the transaction costs to forego collecting fees from nonmembers, employees will be encouraged to resign from the union—not for ideological reasons but because they will be able to receive the benefits of union representation without paying *any* amount (rather than the slightly reduced amount that constitutes the agency fee). *See, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-48 (1968). This would conflict with *Abood*'s directive that agency fee doctrine should not encourage free ridership. *See* 431 U.S. at 221-22. In other words, such a ruling could ultimately present small unions with a Hobson's choice between foregoing a substantial percentage of their revenue or undertaking a major accounting expense out of proportion to agency fee revenues, thereby making representation of employees in smaller bargaining units highly impractical.

IV. THE CONFLICT AMONG THE LOWER COURTS ON THIS QUESTION IS SHALLOW AND DOES NOT YET MERIT THIS COURT'S ATTENTION

Petitioners point out that the Third Circuit has reached a different answer to Question Presented II, in a case decided shortly after the Court of Appeals decision at issue in this *certiorari* petition. In *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125 (3d Cir. 2003), the Third Circuit acknowledged that it was creating a conflict with the Ninth Circuit, but held that "local unions, regardless of their size,

are required to obtain audits of their financial statements." 330 F.3d at 134. While it stated that, if it were "writing on a clean slate," it "might well require something less vigorous for small local unions than independent auditor verification," the court rejected the union's proposed construction of *Hudson* as requiring only large unions to obtain formal audits. *Id.* at 132-33.[6]

Prior to *Otto*, two state courts had considered the same question, reaching opposite results. In *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363 (Mass. 1999), the Massachusetts Supreme Judicial Court held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Id.* at 89. A few months later, however, an Indiana state appellate court held that a local union with an annual budget of less than $4,000 was not required to subject its financial records to a formal, independent audit. *See Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1192 (Ind. Ct. App. 1999). The court reasoned that it was not clear that *Hudson* required an audit in such circumstances and that, in fact, *Hudson*'s emphasis on practicality suggested otherwise. *Id.* at 1191-92.

While other courts have interpreted *Hudson* not to require a formal and independent audit in all circumstances,[7] these are

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[6] Petitioners point out that one of the attorneys who represented the unions in this case when it was pending in the lower courts is the same attorney who has filed a *certiorari* petition in *Otto*. Pet. at 23. However, that attorney does not represent the unions in this Court in the instant case.

[7] Other circuits have understood *Hudson*'s requirements to be sufficiently flexible to permit a small local union to make "adequate disclosure" by something short of an independent auditor's verification. *See Thomas v. NLRB*, 213 F.3d 651, 662 (D.C. Cir. 2000) (Edwards, J.) (upholding local union's use of an empirically supported "local presumption" that chargeable portion of local union's expenditures is greater than chargeable portion of parent union's expenditures, as means to fulfill financial disclosure obligation); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir. 1988) (Posner, J.)

the only four decisions that directly address the question whether *Hudson* requires an audit regardless of a union's size.[8] The first of these decisions was issued in 1999, 13 years after *Hudson*, and the first Court of Appeals decision to

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(approving system of financial disclosure under which local unions' statements of expenditures were "audited" by lay employees of the parent union). While these cases were decided under the National Labor Relations Act ("NLRA") rather than the First Amendment, both courts explicitly applied the principles announced in *Hudson*. *See Thomas*, 213 F.3d at 658; *Machinists*, 133 F.3d at 1017. *See also Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 393-94 (Wis. 1992) (approving use of empirically supported local presumption and holding that *Hudson* does not require audit of *every* local union's expenditures).

[8] Petitioners assert that "[n]umerous cases" addressing the financial disclosure that unions must provide have "involved small local unions." Pet. at 19 & n.18. However, while some of the cases cited by petitioners quote *Hudson*'s discussion of the need for an independent audit, in none of the decisions did the court actually consider the question whether *Hudson* requires small local unions to obtain formal and independent audits. *See Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 730-31 (7th Cir. 1995) (addressing whether plaintiffs were prevailing parties for attorneys' fees purposes); *Masiello v. U.S. Airways, Inc.*, 113 F.Supp.2d 870, 876-77 (W.D.N.C. 2000) (holding inadequate procedure where nonmembers received no financial information at all before objecting and, after objecting, received information that was illegible, missing key facts, and prepared only after the plaintiffs had been threatened and discharged); *Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. 511, 514-15 & n. 7, 516 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992) (holding inadequate procedure by which union management simply estimated percentage chargeable); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986) (determining adequacy of escrow procedures); *McGlumpy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1082 (N.D. Ohio 1986) (holding inadequate union's breakdown of expenses on single sheet of notebook paper, without labeling or indicating amount of non-chargeable expenses or basis for calculations). A number of the foregoing decisions do not even mention the union's size or the complexity of its finances, *see Johnson*, 51 F.3d 726; *Masiello*, 113 F.Supp.2d 870, and one involved a union that represents a bargaining unit of 35,000 employees, *see Mitchell*, 963 F.2d at 259.

resolve the question expressly is the one at issue here. Thus, despite *Hudson*'s age, the split at issue here is very recent and extremely shallow.

Allowing the issue to make its way through the lower courts in other jurisdictions may resolve the split without this Court's intervention or, if this Court ultimately does grant *certiorari* on the question, will inform this Court's consideration with greater development of the relevant factual and legal issues. For example, further development may clarify whether feepayers have been able to obtain the necessary financial information to decide whether to file a challenge without a formal audit, which types of measures short of a formal audit have been employed and how well they have worked, and how small local unions have been affected in jurisdictions where a formal audit is required. This Court will also have the benefit of additional reasoned decisions to review. Given the advantages of waiting, there is no reason for this Court to intervene at this early stage. Instead, this Court should allow the issue to percolate further in the lower federal courts as well as the state courts, and address it if and when the conflict persists after a greater number of courts have considered the issue.[9]

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[9] That the split depends in part upon the interpretation of a Supreme Court case is hardly unique and does not mean that percolation of the issue would be any less useful in informing this Court's ultimate consideration. If this Court were to grant *certiorari* to address this issue, it would not be bound by the footnote in *Hudson*, which was not essential to the Court's holding since the CTU's notice was invalidated for other reasons. *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by holdings, not language"); *Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (dictum, which is not necessary to the final disposition of a case, is not binding). Thus, additional decisions which flesh out the implications of imposing a formal audit requirement on small local unions would be useful in informing this Court's consideration. Moreover, a consensus in the lower federal and state courts may emerge regarding the construction of the footnote at issue in *Hudson*, obviating

V. THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO MERIT THIS COURT'S ATTENTION

The parties to this case have not disputed the notion that large local unions, which have more extensive budgets and more complicated finances than a union such as DTA, must provide nonmembers with financial information that has been verified by a formal audit. In fact, seven of the eight local union defendants did not appeal the district court's holding that they were required to provide audited financial statements as part of their *Hudson* notices.

Thus, the issue raised by Question Presented II will have significance only for small local unions. And the significance of the issue is even further diminished by the fact that it does not arise in many states at all, because no agency fee is collected from nonmembers of a public sector union where (a) public employees lack the right to unionize and engage in collective bargaining, or (b) unions do not have the statutory right to collect mandatory fees from non-union members.[10] Only 23 of the 50 states have passed comprehensive public sector labor relations laws; an additional 13 have passed laws granting more limited collective bargaining rights. *See* AFL-CIO PUBLIC EMPLOYEE DEPARTMENT, PUBLIC EMPLOYEES BARGAIN FOR EXCELLENCE: A COMPENDIUM OF STATE PUBLIC SECTOR LABOR RELATIONS LAWS at 1 (1997). Of these 36 states which allow at least *some* unionization by public employees, ten do not allow unions to collect mandatory fees from nonmembers. *See id.* at 8-66; *see also* ARIZ. CONST., ART. XXV; ARIZ. REV. STAT. §23-1301 et seq.; ARK. CONST. AMENDMENT 54; ARK. CODE §11-3-301 et seq.;

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the need for this Court's review.

[10] When fees are collected from employees of a private employer, no constitutional issue is presented, but the NLRA similarly restricts the purposes for which a nonmember's fee may be spent. *See Air Line Pilots Ass'n*, 523 U.S. at 868.

FLA. CONST., ART. I, §6; FLA. STAT. §447.17; IDAHO CODE §44-2001 et seq.; IOWA CODE §731.1 et seq.; KAN. CONST., ART. 15, §12; KAN. STAT. ANN. §44-831; NEB. CONST., ART. XV, §§13-15; NEB. STAT. §48-217 et seq.; NEV. STAT. §613.230 et seq.; OKLA. CONST., ART. XXIII; S.D. CONST., ART. VI, §212; S.D. LAWS §60-8-3 et seq. Thus, the question whether smaller local unions must obtain formal audits in order to collect fees from nonmembers could not even arise in half of the fifty states.

Finally, besides the small number of feepayers that will be affected, the amount at stake is extremely minor. In the instant case, the amount of the agency fee is less than $90 per feepayer, and the amount reasonably in dispute is a tiny fraction of that amount. SER 109. In *Otto*, the annual fee amount was $45. The stakes for feepayers are extremely low, and do not justify this Court's premature acceptance of *certiorari* on an issue, the consideration of which would be better served by further development in the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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